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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

TERNSTEDT MANUFACTURING COMPANY and GENERAL MOTORS CORPORATION,
Petitioners,

vs.

MOTOR PRODUCTS CORPORATION,
Respondent.

No. 652.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

Your petitioners, Ternstedt Manufacturing Company and General Motors Corporation, pray for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit to review the judgment of that court entered June 25th, 1941.

SUMMARY AND SHORT STATEMENT.

Petitioners were plaintiffs in the District Court, in an equity suit for infringement of two patents, namely, the **Wright** reissue patent Re. No. 18,866 granted June 13, 1933, and the Fisher patent No. 2,048,605 granted June 21, 1936. The suit involved certain claims of the Wright patent and all of the claims of the Fisher patent. The District Court held (R. 767) all the claims in issue of the Wright and Fisher patents invalid over prior patents, printed publications and an alleged prior use; the Wright patent "because of anticipation and lack of invention" and the Fisher patent "for lack of invention"; however, the District Court held that each of the patents **"if valid over the prior art would be infringed by each of the accused devices."** A judgment (R. 768) was entered dismissing the complaint, supplemented by Findings of Fact and Conclusions of Law (R. 756-767).

The Circuit Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court by its decision of June 25, 1941 (R. ...) and its mandate issued on June 25, 1941 (R. ...). The Appeals Court's decision, while affirming the Decree of the District Court, discussed specifically only the question of validity. For convenience a copy of the decision is appended hereto.

The patents in suit have the relation of generic and improvement patents; the Wright patent (R. 794) being a generic patent and the Fisher patent (R. 806) an improvement on Wright, as found by the District Court (R. 758 and 760). The District Court found (R. 760):

> "The construction of the Fisher patent includes that of the Wright patent so that which would infringe the Fisher patent would also infringe the Wright patent."

Note: All emphasis in this Petition and in the Brief are ours.

In view of the above findings of the District Court with reference to the Fisher patent, as related to the Wright patent, **this Petition is only directed to the Wright patent** and it will be sufficient to limit consideration to claims 8 and 19 of the Wright patent.

Subject Matter.

The subject matter of the suit and embodying the invention of the Wright patent, as found by the District Court, involves the well-known **"No Draft Ventilation"** now used on practically every automobile. No Draft Ventilation became standard equipment on all of **General Motors** closed cars beginning in 1932 and has since been adopted as standard equipment on all automobiles in this country except the Lincoln, a custom-built car (R. 551). **Chrysler** Corporation first adopted the Wright invention for its entire line beginning with the production year of 1934, and although Chrysler then went partly to another system, namely, the Crowell system, for the lower priced Dodge and Plymouth cars, for the production years of 1935 and 1936, it retained the Wright invention in the higher priced De Soto and Chrysler cars. Beginning 1937 the Wright invention was again incorporated in the Dodge and Plymouth cars and has continued in all Chrysler Corporation cars ever since (R. 89-90). The **Ford** Motor Company continued the use of the Crowell system (R. 89) until the fall of 1939, when that company adopted the Wright invention for the entire Ford line except for the Lincoln, a custom-built car (R. 551). At the conclusion of the trial it, therefore, appeared that automobile manufacturers in this country had adopted the Wright invention practically **100 per cent.**

No Draft Ventilation embodying the improvement of the Wright patent, as employed in the closed cars of General Motors and other automobile companies, may be generally

described as follows: The front door of a closed car body, immediately behind a slanting windshield, has a window embodying two separate glass panels, one directly behind the other. The front panel is pivoted forwardly on a generally up and down axis so as to provide a substantial area of the panel to the rear of the pivot. The rear end of this front panel may be swung outwardly and held in any one of numerous positions from 0° to beyond 60° with respect to the side of the car. The rear panel slides down into a well in the door to open and slides up to close the rear part of the window; this panel is adjustable up and down by means of a window regulator, and may be held in any one of numerous positions. Enumerable combinations of adjustments of the swinging panel and of the sliding panel may therefore be had to give a variety of conditions affecting **controlled movement** of the air into and out of a closed car. An optimum condition may easily be achieved by the occupant of a car. There is such a pair of panels in each front door and each pair is capable of individual control.

The History of the Art shows that there was **a long-felt want** since the advent of the closed car, for a practical system of closed body ventilation, combined with a practical body construction, which was not solved until the advent of the Wright invention.* As the Court of Appeals found (Dec. p. 7):

> ". . . the ventilation of closed cars had the attention of body designers and automotive engineers from the first use of such cars."

While the Court of Appeals then says, "and the improvements in this respect were slow and steady," the fact is and as found by the District Court (Fd. 12, R. 761), there

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* Although the original Wright application was filed August 2, 1926, it did not issue until June 7, 1932, because of delay in the Patent Office, partly by an Interference proceeding. After issue it was purchased by petitioner and then reissued.

was no commercial use of any ventilating system of the character of the Wright patent before Wright filed.

That there was an immediate public demand for No Draft Ventilation in this country is established by the direct evidence in this case, namely, by data obtained by General Motors Customers Research, explained by Laseau (R. 239) and Exhibits 24-29 (R. 873-893). This Research shows that beginning with the year 1933, the year after No Draft Ventilation first appeared on General Motors cars, down to 1939, the demand for this system by owners of cars, including others than General Motors cars, was overwhelming.

No Draft Ventilation has not only completely revolutionized closed car ventilation, but closed car **body construction** as well. It has displaced entirely ventilation through the windshield, which was relied upon beginning with the advent of the closed car, but which was not only found ineffective, but permitted snow and rain to enter. The incorporation of the two panels in a door which extends up to the windshield makes possible, with improved ventilation and plenty of leg room, for the front seat occupants to easily enter and leave the car, the moving the driver's seat forward with the consequent increase in his field of vision, the shortening of the body, and improvement in the riding qualities of the car. This also makes possible a wide door with its advantages, without requiring a sliding glass panel so wide that operating mechanism for it becomes a problem.

It can truthfully be said that No Draft Ventilation is one of the most valuable improvements in automobile construction in the history of the automobile. If anyone questions this we will reply that nine years ago all closed cars had movable windshields and nothing but full width slideable windows; today every car has a fixed windshield, the front

seat is close to the windshield and the front door windows each embody a pivoted panel and a comparatively narrow vertical sliding panel, all as in the Wright patent. This construction has endured commercially without any material change for nearly a decade and for fifteen years after the filing of the Wright application.

* **The Accused Structures*** are practically copies of No Draft Ventilation as it first appeared in 1932. Indeed, any contention of noninfringement of the Wright patent is exceedingly technical and, as noted previously, the District Court found and concluded infringement of the Wright patent if valid.

The Parties. Petitioner, Ternstedt Manufacturing Company, is a subsidiary of petitioner, General Motors Corporation. Ternstedt manufactures the window frame assemblies for the ventilating system and these are built into the closed cars of General Motors; Ternstedt also supplies these frames to Nash Motor Company for Nash closed cars (R. 260-1). Respondent Motor Products Corporation occupies the same position in a competitive field as does Ternstedt, in that it also makes these window frame assemblies and supplies them to automobile companies for installation in closed cars (R. 85); examples of these are Chrysler and Hupp (R. 84) and lately the Willys Overland and the Ford Motor closed cars, except the Lincoln (R. 551). Chrysler Corporation is co-operating with respondent in the defense of this suit and appeared at the trial by its counsel (R. 476).

The Wright Patent.

In the specific embodiment of the Wright patent (R. 794, see illustration plaintiff's Ex. No. 1-C in Appendix), the

* Exhibits 4, 5, 6 and 7; illustrations in Record, pages 835, 841.

front panel W-23 is pivoted to the front door pillar adjacent the windshield, while in the commercial structures the front panel is pivoted on a generally up and down axis located somewhat rearwardly of its front edge. In Wright, as in the commercial structures, the front panel is **so constructed and pivoted that a substantially major portion of the panel is behind the axis**, and it can swing outwardly to 90 degrees (R. 796, line 22). The District Court found (R. 765-7) no patentable distinction in the above respect of the Fisher patent over the Wright patent, and specifically found that the **Wright patent is "not limited to the hinging of the front panel at the front edge** (R. 760). In the Wright patent as in the commercial structure, **the sliding panel**, W-18, adjacent and at the rear of the pivoted panel, moves into the door, **down to open and up to close** the window encompassed by that panel. Even the specific Wright structure has, however, gone into use in England (R. 228-230).

The Wright patent, therefore, involves a combination of elements in the front door of an automobile and immediately behind the windshield and comprising a pivoted front panel and a sliding rear panel of the construction described. **One of the essential features** of the Wright patent is that the front panel is constructed and pivoted in such a way as to permit the same to **move outwardly into the air stream** coming from around the windshield. **Another essential feature** of the Wright patent is that the sliding panel moves **down to open and up to close**, in order to properly co-operate with the pivoted panel so as to control the entrance and distribution of the air into and within the car and to secure as stated in the Wright patent (R. 796, line 66) **"adequate ventilation without objectionable drafts."**

It is important for the controlled operation of the system

of the Wright patent that the pivoted panel be so constructed, pivoted and movable as to extend into the air stream (R. 162); this is accomplished when the Wright panel is moved to 60° and beyond (R. 164). As shown in plaintiffs' Exhibit No. 1-E, reproduced in the Appendix, and as explained by Professor Thompson (R. 151-161), the air which impinges against the windshield is deflected away from the car body on both sides in curved or bowed-out paths, and does not return to the sides of the car until it gets some distance back of the windshield. If the sliding panel in the front door behind the windshield be moved down, to open then, absent control by the Wright principle, the air coming around the windshield will move through the window opening at a rather sharp angle, causing an objectionable draft. Control of this can be secured by manipulation of the Wright pivoted panel, which will deflect the air stream (1-E).

Additional control can be secured, when the pivoted panel is so extended, by manipulation of the **sliding panel**, as seen in the illustration No. 1-E, and as explained (R. 161-172, 47-48 and 707-710). In order, however, to effect this, the sliding panel must **move down to open and up to close**; for if it moves up to open there will immediately be a sharp blast over the "belt line," that is, the lower part of the window opening (R. 44 and 161).

By the happy combination of the Wright pivoted and sliding panels constructed and operating as described, on the Wright principle, innumerable conditions of ventilation may be secured, and there is definitely a combined result (R. 172) secured not by any single element, but by co-operation of these elements in a door at the front of the automobile and immediately behind the windshield.

In the Wright patent the door extends forwardly to the dash and adjacent the windshield. This is also advantage-

ous from a construction and a use standpoint (R. 693-4), for this has enabled the front seat to be placed close to the windshield, which attains the desirable results of increasing the field of vision of the driver, shortening the body, providing ample leg room, improving the riding qualities of the car and enabling a wide door to be used without an extremely wide sliding panel; all of this with improved ventilation.

The Prior Art.

The prior art relied upon comprises patents, magazine articles and an alleged Stafford car. The latter was not a commercial car, but one said to have been converted by its owner in 1924 by replacing the side curtains of a touring car with wood frame glass windows or sashes (C. C. A. Dec. p. 4), and only Stafford himself testified. Not a single commercial use of any prior patent or magazine article relied upon prior to Wright was proved or even attempted to be proved, although defendant had the co-operation of Chrysler Corporation. (See Fds. 12 and 16, R. 761, 763.)

With reference to the patents and magazine articles, defendant relied, in practically every case for disclosures of the Wright invention, upon drawings and in the case of magazine articles upon indefinite and faint drawings, perspective views and photograph cuts, supplemented by reading matter of from one to ten lines. However, even the most pertinent references, stated to be such by defendant's expert Mr. Brush (R. 351), namely, the **California Top** publication of the year 1922 (R. 1543) and a **Fennerty** Pullman car patent of the year 1886 (R. 1522), admittedly did not disclose either the Wright Pivoted panel or the Wright sliding panel, as will be seen from the blackboard exhibits 44 and 45 (R. 941 and 943); for admittedly the so-called pivoted panels of these references only swing out to 30°

or 40° (R. 351 and 354), which, however, Mr. Brush ascertained from the drawings alone. Professor Thompson showed (R. 163-4, 523) that such structures will not permit the pivoted panel to move out into the bowed-out air stream coming from behind the windshield to secure any useful controlling effect. Neither of these references has a sliding panel which moves down to open and up to close, and neither will secure the mode of operation of the Wright invention in that respect (R. 521, 524-5, 572, 725). In neither is the assembly in a door immediately behind the windshield to secure Wright's unproved body construction.

The Stafford car, discussed by the Court of Appeals (Dec. p. 4), admittedly did not have Wright's sliding panel (R. 471, 953). Professor Thompson showed that the Stafford centrally pivoted panel did not extend into the air stream and could have no useful controlling effect (R. 533, 534, 542, 544), while the sliding panel had the same vice as did that of the California Top (R. 532-4). The Gardner publication (C. C. A. Dec., p. 4) admittedly did not describe the structure of Wright's front pivoted panel at all (R. 385-7, 953). The Auburn wing (C. C. A. Dec., p. 4) admittedly did not describe the structure and Mr. Brush deduced everything from the drawing (R. 418), although Mr. Arnold found no pivoted wing at all (R. 694). The Anibal patent (Dec. p. 6) was found to have a "front panel stationary." The other prior art discussed by the Court of Appeals (Dec. pp. 4 and 5), except Fennerty, previously discussed, was subsequent to Wright's filing date in 1926, and was only used against Fisher.

No attempt was made by respondent to show by evidence of actual tests that any of the things relied upon by defendant had the principle or mode of operation or secured the results of the Wright combination. Although not incumbent upon petitioners to do so, their highly qualified

witnesses made extended tests to show that the Wright combination structure described in his patent attained in practice a new and distinctive principle and mode of operation and secured the results advanced, and that none of the things relied upon by respondent did so. All of this was graphically illustrated in Exhibit 66 (R. 1075) and explained by Professor Thompson (R. 578 etc.), and verified by the practical and experienced Arnold (R. 725). While these tests were made by these witnesses ex parte, near the conclusion of the trial, petitioners offered to repeat them interparties (R. 711). However, the District Court stated (R. 729), "I am satisfied that they made the tests and got the results they said."

The District Court's Findings.

The District Court found specifically (Fd. 6, R. 759-760): the Wright combination to be "for a combination of elements and the combinations are definitely useful, helpful and good"; that "the elements of each combination cooperate and work together"; that the specification of the Wright patent "gives information to the public as to the construction and mode of operation of the combination," and that there was no commercial use of Wright's invention, nor even of a wind wing, prior to his filing date (Fds. 12 and 16, R. 761 and 763).

The Court of Appeals Decision.

The Court of Appeals said (Dec. p. 3):

> "There is no doubt of the utility of this combination. If Wright was its original and first inventor, the device was patentable to him."

The Court further apparently also found (Dec. page 6) that Wright:

> "• • • devised a new construction which secured a distinctive and new mode of operation and satisfied

a long-felt want for a practical system of closed car ventilation combined with a more perfect and convenient body construction."

Further, apparently (Dec. page 6):

"* * * its use has been attended with commercial success in the way of a better and more satisfactory method of ventilating closed automobile bodies."

And specifically (Dec. page 7):

"* * * the ventilation of closed cars had the attention of body designers and automotive engineers from the first use of such cars."

The Court also found with reference to Wright (Dec. pages 2-3):

"* * * he specifically claims that the swinging front panel has two functions, that of an ejector or extractor of air combined with a shielding effect, which, in conjunction with the operation of the vertical rear panel, causes an inflow of air in the back of the vertical panel and an outflow in the back and front of the pivoted panel, thereby permitting ventilation without subjecting passengers to drafts in the process of changing the air about them."

In, however, concluding that the Wright patent was invalid, the Court of Appeals, while apparently finding in the Wright patent a structure which secured a distinctive mode of operation, apparently read into the prior patents and publications a structure and mode of operation not described therein, and attributed a result which did not follow from the structure described therein and at most only ascertainable from the drawings. The Stafford use was also considered without reference to Wright's principle or mode of operation, which was not proved at all. All of this was without any evidence by respondent in the form of tests of the operation of any of the prior art, and without any rebuttal of Petitioners' evidence of actual tests.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Petitioners believe that a Writ of Certiorari should be granted in this case for the following reasons:

I.

That the Circuit Court of Appeals for the Sixth Circuit misinterpreted R. S. 4886 in the light of R. S. 4888, by holding a patent in suit invalid over prior patents and prior publications, where the structure of the patent in suit necessary to secure a new and distinctive principle or mode of operation and result, was not described in any of the prior patents and publications.

II.

That the Circuit Court of Appeals for the Sixth Circuit misinterpreted R. S. 4886 in the light of R. S. 4888, by holding a patent in suit invalid over an alleged prior use where the structure of the patent in suit necessary to secure a new and distinctive principle or mode of operation and result was not proved to have been present in such use.

LITIGATION IN OTHER CIRCUITS IMPROBABLE AND PUBLIC IMPORTANCE.

Although this is the first decision in any circuit on the Wright patent, it is improbable and practically foreclosed that there will be litigation in any other circuit. This court granted certiorari in The Schriber-Schroth Co., Petitioner, v. Cleveland Trust Company and Chrysler Corporation, Respondents, 305 U. S. 47, this court stating, page 50:

> "We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation else-

where with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit. Cf. Paramount Publix Corporation v. American Tri-Ergon Corporation, 294 U. S. 464; Altoona Publix Theatres, Inc., v. American Tri-Ergon Corporation, 294 U. S. 477."

The judgment of the Court of Appeals for the Sixth Circuit in this cause renders utterly futile any further effort by petitioners to establish the Wright patent except by this Petition. Further litigation in the Sixth Circuit, without a reversal by this court in this cause, would obviously be futile. Even if a judgment upholding the Wright patent were obtained in another circuit, and even if the judgment in the supposed cause were reviewed by this Court, because of its conflict with the judgment of the Court of Appeals for the Sixth Circuit in this cause, and were affirmed by this Court, it would avail your petitioner nothing. In such a case the judgment of the Court of Appeals of the Sixth Circuit would still leave the respondent and its customers immune to the patent. Accordingly, the whole of the automobile industry could readily obtain immunity to the patent by the simple expedient of becoming customers of the respondent, which is located in the Sixth Circuit, conveniently to the automobile industry which is concentrated in the Sixth Circuit, and which can readily supply the window frame assemblies, as it now does to the entire automobile industry, except General Motors and Nash.

The circumstances outlined above, the importance of the subject matter of the Wright patent and its effect on the automobile industry, call for a review of the judgment of the Court of Appeals for the Sixth Circuit in this cause by this Court. Unless this Petition is granted your Petitioners' relief for infringement of the Wright patent is precluded by the judgment of the Circuit Court of Appeals for the Sixth Circuit.

Furthermore, the decision of the Court of Appeals for the Sixth Circuit has misinterpreted R. S. 4886 in the light of R. S. 4888, and this is liable to result in confusion. This court in its early history construed R. S. 4886 with reference to R. S. 4888 in determining the sufficiency of a prior patent or publication; the Cawood Patent Case, 94 U. S. 695, 704; Seymour v. Osborn, and 11 Wall. 516, 555, and in determining the sufficiency of a prior use; Coffin v. Ogden, 18 Wall. 120, 124). However, there has been no discussion of these specific questions by this court for several decades, although this court's views with reference to the sufficiency of the state of the prior art generally has advanced with accumulation of knowledge in the various arts.

Prior to Permutit Co. v. Graver Corp., 284 U. S. 52, decided in 1931, there had been confusion as to the requirements of R. S. 4888 as applied to a patent in suit, which was set at rest in that case. However, after Permutit v. Graver there had been confusion as to the requirements of R. S. 4888 as applied to a pending application, and it was therefore necessary for this Court to set at rest such confusion in The Schriber-Schroth Company v. The Cleveland Trust Company et al., 305 U. S. 47, decided in 1938.

The situation involving the construction of R. S. 4886 with reference to the sufficiency of a prior patent, publication and use has developed like that involving the construction of R. S. 4888 with reference to the sufficiency of a patent in suit, and that confusion has continued since Permutit v. Graver was decided in 1931. The Circuit Courts of Appeals who have followed the principles of the decisions of this court are the third circuit, Root Co. v. Universal Co., 78 F. (2) 991, 994; the eighth circuit, Wisconsin Foundation v. Breon & Co., 85 F. (2) 166, 167; the tenth circuit, Williams Co. v. Hughes Co., 109 F. (2) 500, 510. The Court of Customs and Patent Appeals has even distinguished cases involving a patent asked for and a

granted patent in suit. Thompson v. Dicke, 110 F. (2) 98, 105. The Court of Appeals for the Sixth Circuit has, however, in this case, misinterpreted R. S. 4886, as well as this court's decisions construing that Statute in the light of R. S. 4888. Clearly, it is a matter of public policy that such misconstruction should be cleared up, and that any confusion in other circuits be prevented.

PRAYER.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit to the end that this cause may be reviewed and determined by this court; that the decree of the Circuit Court of Appeals for the Sixth Circuit be reversed, and that Petitioner be granted such other and further relief as may be proper.

TERNSTEDT MANUFACTURING COMPANY,
GENERAL MOTORS CORPORATION,

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September 23, 1941.